No. 96-2001

Supreme Court, U.S.
FILED
AUG 18 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

TEXAS PHARMACY ASSOCIATION, *et al.*,

Petitioners,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit held that the Texas statute here at issue (Article 21.52B of the Insurance Code (Vernon Supp. 1994)), (hereafter the "Statute"), regulated: (a) entities that are not insurance companies; and (b) contracts between such entities and ERISA plans pursuant to which: (i) there was no insurance; and (ii) the regulated entities functioned solely in an administrative capacity to such plans. As there is no decision by this Court, or by any Circuit Court of Appeals, which holds that a state law such as the Statute is not subject to preemption pursuant to ERISA's preemption clause, 29 U.S.C. § 1144 (a) or, if so subject, is saved from preemption pursuant to ERISA's "Savings Clause," 29 U.S.C. § 1144(b)(2)(A), the question presented is whether there is a conflict between lower court precedent for the Court to resolve?

2. In *CIGNA Healthplan of Louisiana, Inc. v. Louisiana ex rel. Ieyoub*, 82 F.3d 642 (5th Cir.), *cert. denied*, 117 S. Ct. 387 (1996) (hereafter, "*CIGNA*"), a Louisiana statute substantively identical for all presently relevant and material purposes to the Statute, was held by the Fifth Circuit to be subject to ERISA preemption pursuant to and not saved from such preemption by virtue of 29 U.S.C. § 1144(b)(2)(A). This Court declined to review the decision of the Fifth Circuit's decision in *CIGNA* on November 4, 1996, and the question presented is whether there is any objective reason or necessity for this Court to now come to a different conclusion in this case?

3. The decision in *Stuart Circle Hospital Corp. v. Aetna Health Management*, 995 F.2d 500 (4th Cir.), *cert. denied*, 510 U.S. 1003 (1993) involved a Virginia statute that regulated only: (a) insurance companies; (b) PPOs (preferred provider organizations) owned by insurance companies; and (c) the terms and provisions of insurance policies. *Id.* at 502. No term or

provision of the Virginia statute regulated uninsured administrative arrangements or other fiduciary relationships between ERISA health and welfare plans and any entity. The Statute, in contrast, regulates non-insurance entities and uninsured relationships. The Statute goes so far as to purport in uninsured contexts, to empower ERISA plan participants to freely choose their own pharmacy provider notwithstanding a decision by either their plans' sponsors or a plan fiduciary that a restricted network best serves the plan's needs, interests and requirements. Art. 21.52B § 7(a)(1)3. The question presented is whether, given the great substantive disparity between the scope and effects the Texas statute here at issue and the Virginia law at issue in *Stuart Circle*, the differing conclusions respecting the applicability of ERISA's preemption and insurance savings clauses reached by the Fourth and Fifth Circuit Courts of Appeal constitute a "conflict" under any sensible definition or understanding of that term?

4. In *Blue Cross and Blue Shield of Kansas City v. Bell*, 798 F.2d 1331 (10th Cir. 1986) the issue resolved, as described by the Petition, was whether "an insured's choice of a provider was the essence of the coverage bargained for as the statute operated to spread or transfer the policyholder's risk. *Id.* at 1335." [1] The Statute at issue here is not limited to insurers, insurance policies or to circumstances in which there is a spread or transfer of insurance risk. The Statute regulates uninsured settings and relationships as well as entities which are not either insurers or functioning as insurers. The question presented, therefore, is whether, given the plain and relevant disparities between the statutory issues presented in *Bell* and those

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1. *Petition for Writ of Certiorari*, at p. 12. Respondent does not dispute Petitioner's description of the issue that was resolved in *Bell*. This concurrence is not intended to suggest that The Prudential believes that the decision was sound.

presented in this case, a conflict between the Fifth and Tenth Circuit Courts of Appeal fairly and accurately may be asserted to exist?

5. Whether Petitioner's request that the Court review the Texas statute in its initial form as if it had not been amended by the Texas legislature, and thus effectively disregard its current and effective terms and provisions, amounts to a request for an advisory opinion as to a hypothetical circumstance?

STATEMENT PURSUANT TO RULE 29.6

The Prudential Insurance Company of America is the parent company of only wholly owned subsidiaries of The Prudential Insurance Company of America.

COUNTERSTATEMENT OF THE CASE

Petitioners' *Statement of the Case* is inadequate, and thus potentially misleading, in a material respect. The Prudential Insurance Company of America's (hereafter, "The Prudential") activities in Texas asserted to be subject to the Statute include the provision of administrative services to ERISA plans. R. at 00084-00087; R. at 00088-00090. These relationships commonly are known as "ASO" contracts. In such ASO contract relationships, The Prudential provides plan administration and claims processing services to ERISA plans. It does not assume or accept any transfer of risk with respect to these plans' covered benefits. The substantial majority of The Prudential's membership in Texas consists of ERISA plan participants and beneficiaries. R. at 00080-00090.

In the performance of its contractual plan administration and claims processing obligations, The Prudential frequently functions in a fiduciary capacity within the meaning of ERISA. *See Arkansas Blue Cross and Blue Shield v. St. Mary's Hosp., Inc.*, 947 F.2d 1341, 1346 (8th Cir. 1991), *cert. denied*, 504 U.S. 957 (1992); *Benvenuto v. Connecticut Gen. Life. Ins. Co.*, 643 F. Supp. 87, 90 (D.N.J. 1986). The Statute is prescriptive as to the criteria The Prudential must apply when it is functioning in the capacity of an administrator for a self-funded ERISA plan with respect to: (a) pharmacy benefit delivery design structures; (b) selection of the providers who will be entitled to be compensated with plan assets for services to plan participants and beneficiaries; and (c) how to achieve the most economically and administratively prudent approaches to contracting with pharmacy providers to which the plan will become liable. R. at 02057-02060.

Because of the Statute, self-funded ERISA plans which desire to utilize a restricted pharmacy provider network for either

economic or administrative efficiency reasons, or both, cannot utilize the services of a third-party[2] experienced in the creation and management of such networks. The single means permitted by the Statute through which a self-funded ERISA health and welfare plan can limit the delivery of pharmacy benefits to an identified network of pharmacies requires the plan to itself organize and manage the network. Although it is pertinent that such an undertaking may or may not be either prudent or feasible for a given plan, Petitioner's disregard of this factual effect of the Statute obscures a material legal issue, *i.e.*, whether under ERISA's preemption clause a state law may deny to ERISA plans and their fiduciaries all plan administration choices but one from those that otherwise would be available and plausible options. There is no case decided by any Court of Appeals which holds that ERISA does not preempt a state law that denies administrative and plan design choices to ERISA plans[3] and their fiduciaries. Thus, Petitioners factual omissions mask the circumstance that the decision of the Fifth Circuit in this case is consistent, and not at all in conflict, with all existing relevant precedent.

REASONS FOR DENYING THE WRIT

There are three simple and straightforward reasons why this case does not warrant review by the Court.

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2. Art. 21.52(B) § (6) refers, and thus makes the Statute applicable to, what it calls "another organization." There is no elucidation or explanation in the Statute or in regulations as to the identity or defining characteristics of the entities which constitute such an organization.

3. The Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1674, 1678-80 (1995), references and affirms the Court's prior decisions that ERISA's preemption clause denies to the states any ability to interfere with either ERISA plan fiduciary functions or with plan structure, administration or organizational issues and matters.

First, there is no relevant material distinction between the Texas statute at issue in this case and the Louisiana statute at issue in *CIGNA*. Nor is there any material distinction in either the holdings, or the reasoning in support thereof, of the Fifth Circuit Court Appeals in this case and in *CIGNA*. Indeed, in this case, the Fifth Circuit holds that its ruling is "compelled by our recent decision in *CIGNA*." *Texas Pharmacy Ass'n v. The Prudential Ins. Co. of America*, 105 F.3d 1035, 1038 (5th Cir. 1997). Petitioners have not identified any new decision, or other pertinent development since the Court determined last November that the decision in *CIGNA* did not warrant review that calls for a different result here.

Second, as fairly appears from the immediately preceding "Questions Presented" section, Petitioners' assertion that there is a conflict between the Circuits wholly lacks foundation. The Fourth and Tenth Circuits decisions upon which Petitioners depend to create the appearance of a conflict, *Stuart Circle* and *Bell*, both involve materially distinguishable statutes, issues and circumstances. Neither *Stuart Circle* nor *Bell* involve the applicability of a state statute to an uninsured relationship. In contrast, the Statute plainly regulates uninsured relationships between ERISA plans and entities which perform plan administration and claims processing functions affecting the disposition of such plans' assets as distinguished from an insurer's own assets. Neither *Stuart Circle* nor *Bell* stand for the proposition that ERISA does not preempt a state's attempt to regulate such ERISA plan relationships and functions.

Third, the Petition seeks review of a hypothetical statute which no longer exists. Petitioners request the Court to consider the Statute as is was before it was amended. The former statute was limited in its reach to insurance companies and to insurance coverage. In effect, Petitioners blink away the reality that the Statute was amended to extend its regulatory scope far beyond

insurance companies and insured relationships. In effect, Petitioners present a bare hypothetical issue.

Assuming, arguendo, that it were appropriate to request the Court to issue what amounts to no more than an advisory opinion as to a hypothetical statute, the Fifth Circuit's decision in this case establishes that there would be no conflict between the Courts of Appeal for this Court to resolve. In a frankly curious portion of its decision, the Fifth Circuit addressed the ERISA preemption issues as they would apply to what it refers to as "*The Prior Statute*." *Texas Pharmacy Ass'n*, 105 F.3d at 1040. The unique quality of this undertaking is signaled by the opening sentence of the analysis which states: "We question whether a ruling on the validity of the old statute is of much value to the parties, . . . [.]" *Id.*

Whether the Fifth Circuit should have addressed a non-existent statute may be an issue for another time. What is pertinent for present purposes, however, is that the opinion below expresses agreement "with the reasoning of the Fourth Circuit in *Stuart Circle Hospital Corp. v. Aetna Health Management* . . . [.]" *Id.* at 1041. It then is speculatively opined that the "prior statute" would have been saved from ERISA preemption by virtue of the Savings Clause. 29 U.S.C. § 1144(b)(2)(A).

The result of the Fifth Circuit's examination of a moot statute, of course, is that Petitioner's contention that there is a conflict between the Circuits has been completely undermined and is untenable. The Fifth Circuit's opinion clearly establishes that there is no conflict between it and any other Circuit Court as to the issue whether a state statute which only regulates insurance companies and the contents of insurance policies in insured relationships with respect to provider networks is preempted by ERISA.

If the Court believed that the decisions in *Stuart Circle* and *Bell*, as well as the speculative portion of the decision below, require review and correction, that, of course, would constitute a reason to grant the Petition. There is no substance, however, to the Petitioner's contention that there is a conflict in the relevant case precedent that requires the intervention of the Court.

CONCLUSION

For these reasons, it respectfully is submitted that the *Petition for Writ of Certiorari from The United States Court of Appeals For The Fifth Circuit* should be denied.

Respectfully Submitted,

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